UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

MGM GRAND HOTEL, LLC
d/b/a MGM GRAND

and **Case 28-CA-186022**

CYNTHIA THOMAS

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for the General Counsel

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for the Respondent

DECISION

STATEMENT OF THE CASE

JOHN T. GIANNOPOULOS, Administrative Law Judge. This case was tried before me in Las Vegas, Nevada over a four-day period in February 2019, based upon a Complaint and Notice of Hearing ("Complaint") dated September 27, 2018. The Complaint alleges that MGM Grand Hotel, LLC d/b/a MGM Grand ("Respondent" or "MGM Grand") violated Section 8(a)(1) and (3) of the National Labor Relations Act (the "Act") by suspending and discharging Cynthia Thomas. Respondent denies the allegations.

Based upon the entire record, including my observation of witness demeanor, and after considering the briefs filed by all the parties, I make the following findings of fact and conclusions of law.[1]

I. JURISDICTION AND LABOR ORGANIZATION

Respondent operates a hotel and casino in Las Vegas, Nevada which provides customers with gaming, lodging, entertainment, and dining services. It derives annual revenues exceeding $500,000 and purchases and receives goods and materials valued in excess of $5,000 directly from points outside of the State of Nevada. Respondent admits, and I find, that it is an employer

[1] Testimony contrary to my findings has been specifically considered and discredited. Witness demeanor was the primary consideration used in making all credibility resolutions.

engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that Culinary Workers Union, Local 226 ("Culinary Union"), Bartenders Local Union 165 ("Bartenders Union"), and the Local Joint Executive Board of Las Vegas ("Joint Executive Board"), are all labor organizations within the meaning of Section 2(5) of the Act. All three labor organizations are collectively referred to herein as the "Union."[2] (Tr. 35)

II. FACTS

A. General Background

The MGM Grand is a resort hotel and casino located on the Las Vegas Strip. It has over 150,000 square feet of gaming space, more than 6,500 guestrooms, and offers guests multiple swimming pools, luxury shopping, restaurants, bars, lounges, and nightclubs.[3] Respondent's hospitality employees, including bartenders and cocktail/lounge servers, are represented by the Union and work pursuant to the terms of a collective-bargaining agreement ("CBA") between the Respondent and the Union.[4] (JX. 1)

Cynthia Thomas ("Thomas") worked as a cocktail server at the MGM Grand from March 2005 until she was fired on October 18, 2016. Cocktail servers work at the various bars and lounges throughout the MGM Grand, or on the casino floor, serving drinks to patrons.[5] Thomas was also a Culinary Union steward; she had served as a steward for about five years. At the MGM Grand, both the Culinary Union and the Bartenders Union have individuals designated as union stewards. Generally, Culinary Union stewards are used to represent employees, including cocktail servers, who are members of the Culinary Union and Bartenders Union stewards are used to represent the bartenders. That being said, it is not uncommon for Culinary Union stewards to represent Bartenders Union members, and vice-versa. Bartenders and cocktail servers are covered by the same CBA, which is signed by the Joint Executive Board. (Tr. 35, 40, 40–41, 488, 543–46; JX. 1)

During the relevant time period, Monica Dorsey ("Dorsey") served as the executive director of food and beverage and was responsible for the MGM Grand's bars, lounges, swimming pools, catering, and banquets facilities. Dorsey reported directly to Jason Shkorupa ("Shkorupa"), the vice-president of food and beverage. (Tr. 421–22)

In July 2016, Michelle Zornes ("Zornes") had recently been promoted to become the director of the beverage department; she reported to Dorsey. In this capacity Zornes oversaw the beverage operations of the entire property, which included 36 bars/lounges and 330 employees.

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[2] Transcript citations are denoted by "Tr." with the appropriate page number. Citations to the General Counsel, Respondent, and Joint Exhibits are denoted by "GC," "R," and "JX" respectively. Transcript and exhibit citations are intended as an aid only. Factual findings are based upon the entire record and may include parts of the record that are not specifically cited.

[3] See *MGM Resorts Int'l v. Unknown Registrant of www.imgmcasino.com*, 2015 WL 5674374, at *1 (D. Nev. 2015), report and recommendation adopted, No. 2:14-CV-1613-GMN-VCF, 2015 WL 5682783 (D. Nev. 2015).

[4] The Joint Executive Board is composed of both the Culinary Union and the Bartenders Union. (Tr. 35)

[5] Respondent had a split job description of lounge server/cocktail server, with the cocktail servers working exclusively on the casino floor; servers could bid back and forth between the two classifications. (Tr. 543–44; JX. 2, pp. 225–26) For ease of reference both job descriptions are referred to herein as "cocktail server."

There were multiple managers and assistant managers in the beverage department who ultimately reported to Zornes. One of the assistant managers was Nathan Brown ("Brown"). Brown, who was an assistant lounge manager, was new to the MGM Grand, having been hired towards the end of July 2016. He was responsible for five different bars, including the bars named "Lobby Bar," "Rouge," and "Centrifuge." During this time frame Dan Groesbeck ("Groesbeck") served as one of the casino floor beverage managers; he also reported to Zornes. (Tr. 106, 165, 301, 508–09; R. 4)

In charge of employee and labor relations for the food and beverage department was Maureen Keefe-Wiseman ("Keefe-Wiseman"). Her job duties included investigations, disciplinary issues, grievances, and arbitrations. (Tr. 290–91, 300)

B. Loser's Lounge

In 2015, Respondent was contemplating closing Rouge, which was owned by the MGM Grand, and leasing the space to an individual named Steve Ford ("Ford") who would open a bar named "Losers" in the same location. Rouge and was one of the bars where Thomas had previously worked. (Tr. 69, 515)

To test whether it was a good idea to close Rouge and lease the space to Ford, Respondent decided to first run a pop-up of Losers to see if the concept would work. A temporary façade and sign was erected, and the space was run as Losers for a period of time. The Losers pop-up concept was operated by Respondent, therefore no change in personnel occurred. (Tr. 444–46, 510, 516, 555)

Thomas worked at Losers while it was operating as a pop-up and during that time she met Ford. At some point the two shared phone numbers and started communicating via text message. Thomas thought they had become friends. (Tr. 555–56, 566–67, 631)

Respondent ultimately decided to close Rouge and lease the space to Ford to operate Losers permanently. On June 30, 2016, Thomas received an email from another union steward saying that Rouge was closing, and the space would be leased out and reopened as Losers. The email also said that Dorsey told the cocktail servers working at Rouge that they would lose their shifts and seniority in the new venue. The email ends by saying the stewards needed help arranging a meeting between the Union and Respondent because the CBA allows incumbent employees to work in areas that are leased out to third-parties without losing their seniority. (Tr. 549–51; GC. 18)

A meeting was ultimately held in the private dining room of a restaurant on the property during the summer of 2016. Present at the meeting for Respondent was Dorsey, Zornes, and Keefe-Wiseman. An official from the Union was also there, along with various stewards and employees, including Thomas. According to Thomas, during the meeting Dorsey said that there was going to be a dance audition for employees who were going to be working at Losers. At some point Thomas texted Ford, asking whether it was true that there was going to be a dance audition to work at Losers. Ford replied saying it was not true and asking Thomas where she heard that information. Thomas testified that she then texted Ford something about not believing

everything that was being told to him from one side. However, Thomas could not recall the specifics of this exchange, whether she mentioned Dorsey by name, or said that Dorsey was untrustworthy; she had deleted the messages. During their text exchange, Thomas also told Ford that he could ask her any questions that he had about the Union. (Tr. 552–53, 557–59, 561–62, 567–68, 629–30)

Subsequently, sometime during the late summer or early fall of 2016, Dorsey met with Ford one day in her office. According to Dorsey, Ford asked her about Thomas, saying that he wanted Dorsey to be aware of an odd text message that Thomas sent him. Ford then showed Dorsey a text message that he had received from Thomas saying that Dorsey should not be trusted. After the meeting, Dorsey contacted Keefe-Wiseman and told her to ask Thomas if she had sent the text message to Ford. If so, Keefe-Wiseman was instructed to tell Thomas not to contact Ford making negative comments about anybody on the property because Dorsey does business with Ford. (Tr. 441–47)

On September 28, 2016, Zornes sent Thomas a text message asking her to come into the office. Zornes and Keefe-Wisemen met with Thomas; they had also arranged for a Bartenders Union steward to be present during the meeting. Zornes asked Thomas about her text messages with Ford, saying that a specific text message was brought to their attention that mentioned Dorsey "in not such a good manner." She asked Thomas what her intentions were in sending the message. Thomas was surprised, as she thought that she had developed a friendship with Ford. Thomas replied saying that she and Ford had exchanged various text messages, but that she respected Dorsey and liked working with her. No discipline issued over the matter, but Zornes and Keefe-Wiseman reviewed Respondent's code of conduct with Thomas. (Tr. 519–20, 524–25, 561–63; GC. 16)

C. The Lobby Bar incident

1. Overview of the bar

The Lobby Bar is located near the hotel's front desk and is elevated a few steps above the casino floor. Railings separate the bar's lounge and seating area from the casino gaming areas which surround the Lobby Bar on two sides. The bar top is a semi-circle with about 10 barstools and gaming machines imbedded into the bar for guests to play. The lounge area has about 20 tables along with lounge seating that can hold about 80 people. (Tr. 113–14, 118; GC. 4)

Up to four bartenders work the Lobby Bar, both regular and service bartenders. Service bartenders fill drink orders for the cocktail servers from an area known as the service well; the primary service well is located in the right-rear corner of the bar top. After receiving their orders from the service bartender, the cocktail servers deliver the drinks to guests sitting in the lounge. The regular bartenders serve guests directly from the bar, including those sitting at the barstools. (Tr. 113, 119–120, 198–99, 226; GC. 4)

Respondent uses a point-of-sale (POS) system to track bar orders. The Lobby Bar has five POS terminals, one in the service well for the cocktail servers and one for each bartender.

Every POS terminal contains a computer screen where drink orders are entered/viewed and an attached printer which prints a drink ticket/receipt. (Tr. 125; GC. 4)

After a guest orders a drink from a cocktail server, the server is supposed to enter the order into the POS system for the bartender to fill. To enter an order, the server activates the POS system by swiping their employee card. This activates a screen on the monitor showing the bar's various table numbers. The server selects a table and then inputs the specific order. This action sends the order to the bartender's POS screen and prints a ticket at the bartender's POS terminal. The cocktail servers can also choose whether or not to print a ticket at the service well's POS terminal. (Tr. 124–27)

2. Episode involving Nathan Brown, Lee Crain, and Fontay Jones

On September 27, 2016, Brown started work at 8:00 p.m. and was on duty until 4:00 a.m. the next morning; he was the assistant lounge manager that night. At about 12:20 a.m. on September 28, Brown witnessed a transaction between bartender Lee Crain ("Crain") and cocktail server Fontay Jones ("Jones") which he thought was suspicious. Brown was standing in the Lounge Bar's service well observing the night's activities when Jones walked up to the bar and asked Crain, who was working as the service bartender, for a bottle of beer. Brown observed Jones act as though she was placing a drink order into the POS system and then ask Crain for the drink. However, Brown did not see a drink ticket print out from any of the POS printers.[6] Crain grabbed a beer from the refrigerator, took off the cap, and set it on the bar. Jones then delivered the beer to a table in the lounge area. (Tr. 102, 111–12, 116, 119–123, 128, 133; GC. 5)

As Jones was delivering the drink, Brown asked Crain where the ticket was for the beer. Crain shrugged his shoulders. Brown asked again, saying that a ticket did not print. Crain then started looking around his work area and the trash; he could not find a ticket for the beer in question. (Tr. 128, 204–05, 210–11; GC. 5)

After delivering the beer Jones came back to the bar. Brown asked Jones why she did not enter the beer into the POS system, and asked her to produce a ticket for the beer. Jones could not give Brown a straight answer. Brown asked Jones for the table number she had just served. He reviewed the POS system, confirmed that the beer had not been entered for the table in question, and asked Jones whether she was going to enter the beer into the POS system. Jones acted confused saying that she did not want to overcharge the guests and was not sure if she had rung in the beer. Brown told her that a ticket did not print. Brown eventually entered the beer into the POS system himself. (Tr. 128–139; GC. 5)

[6] At trial Brown testified that he did not remember Jones doing anything with the POS screen. However, this testimony is contrary to the detailed email he wrote two hours after the incident actually occurred. When confronted with this inconsistency Brown absurdly testified that his memory of what happened was "not necessarily" better a few hours after the incident as opposed to when he testified at trial over two years later. (Tr. 150, 161; GC. 5) This testimony is also different than Brown's testimony during the November 2017 arbitration hearing where Brown said that his email truly and accurately summarized what he saw that evening. (JX. 2, p. 88) I generally did not find Brown to be a very credible witness. As to what Brown saw that evening I credit what he wrote in his September 28, 2016 email over any of his conflicting trial testimony.

After the incident, Brown went to the office and spoke with an assistant beverage manager. Brown explained what had occurred, and at about 2:30 a.m. the two viewed video surveillance footage of the incident. The video footage confirmed that the beer was ordered, and delivered, without a ticket. The pair returned to the office and the assistant manager started completing forms to suspend both Crain and Jones pending investigation. At 3:34 a.m. on September 28, about a half-hour before ending his shift, Brown sent a detailed email of what occurred to a variety of management officials, including Zornes. (Tr. 131–35, 140; GC. 5)

3. Brown speaks with Cynthia Thomas about the Lobby Bar incident

Brown's next shift started on September 28, at 8:00 p.m. At some point after 10:30 p.m. that evening he had a conversation with Thomas in the Centrifuge Lounge. Brown approached Thomas saying that he wanted to run something by her because she was a shop steward. He first asked Thomas what steps are taken when an employee is to be suspended pending investigation, and then asked when a shop steward is needed in the disciplinary process. After discussing these issues, Brown explained to Thomas the details of what occurred at the Lobby Bar involving Crain and Jones. He told Thomas that he saw Jones act as if she was ringing a drink order into the POS system and then ask Crain for a beer.[7] He further said that Crain gave Jones the beer, but when asked for the ticket, Crain could not produce one but instead started looking around. As for Jones, Brown told Thomas that Jones was pretty sure she rang up the drink and did not want to double charge the customer. Brown further told Thomas that he reviewed the check in the POS system, did not see the beer on the bill, so he entered the drink into the system himself. Thomas had previously worked with both Crain and Jones and knew both of them. (Tr. 145–46, 173–74, 570, 572–76, 600; GC. 6)

Thomas and Brown then discussed different potential scenarios that could have accounted for the incident. Thomas told Brown that several things could have explained the episode. First, the beer could have been entered into the POS system, but there was a computer glitch. Next, Thomas said that there could have been a printer error, as they had problems with the printers in the past. Thomas also suggested that Jones could have been very busy and was planning to come back later to ring in the beer or perhaps she had forgotten the beer from a previous order and thought it was already accounted for. Finally, Thomas speculated that the ticket could have fallen on the floor or was thrown away by the bartender. At some point during the conversation, Brown told Thomas that Respondent was planning to suspend both Crain and Jones pending investigation, but that they would probably be brought back to work nonetheless. (Tr. 147–48, 174, 577–78, 640; GC. 6)

Crain ended his shift at 2:00 a.m. on September 28. The next day, when he came to work Crain was called into the office by Groesbeck. Randy West ("West"), a Bartenders Union steward was also present in the office. Groesbeck explained the situation, saying that a manager had witnessed Crain hand a beer to a server without a ticket, and that Respondent was suspending Crain pending investigation to determine exactly what happened. Groesbeck asked Crain what occurred. Crain said that he thought he owed Jones a beer from a previous ticket

[7] Brown testified that he did not think he told Thomas that Jones acted as if she was entering an order into the POS system. (Tr. 150–51) However, I credit Thomas's testimony that this is what he told her. As noted earlier I did not find Brown to be a particularly credible witness.

involving a large order for a party of 15 people. Crain was nervous, and could not understanding why he was being suspended, as usually such minor issues were resolved without a suspension. Crain was required to turn in his badge, his nametag, and sign his suspension paperwork. (Tr. 205–06, 214–18; GC. 8)

On September 30, Crain was called back into work to attend a "due process" meeting. Present for this meeting was Zornes, Keefe-Wiseman, two other managers, and a Bartenders Union steward named Tony Venci ("Venci"). During this meeting, Crain was again asked about the incident, and further asked to provide a written statement of what occurred. Crain admitted giving Jones a beer without her ringing the drink into the system. However, Crain said that the way Jones asked for the beer made him think that he had forgotten a beer on a previous order. Crain complained that the Lounge Bar POS system did not print duplicate tickets, and he is unable to save tickets for his own records as the servers take the receipts with their orders and then throw them away. Crain told the management officials that he believed Jones made a mistake as it was the end of her shift and she was trying to close out the checks on two large parties. Respondent also interviewed Jones that day. Jones similarly said that it was the end of the night and she was trying to finish up and close out two large parties. Jones thought she had entered the beer into the system, and said it was a mistake if she did not do so. (Tr. 220–21, 230; GC. 8, 9; R. 2)

The same day of his due process meeting Crain was returned to work, with backpay. Respondent concluded the employees were not trying to give away free drinks or split money/tips on drinks that were not accounted for. Instead, Respondent believed the entire episode was a mistake, and that Crain honestly believed that he owed Jones a beer from a previous order. Crain was issued a documented verbal warning because the video footage showed that he was not using a jigger to measure the drinks he was serving, and that he used his cell phone while at work. The discipline also noted that he served a beer without verifying that it had been entered into the system properly. And Jones, who was never suspended over the incident as she had been off-work the previous two days, was issued a job performance "note to file" for not entering all of her orders into the POS system. (Tr. 221–22, 229, 292–94, 342, 348, 360, 399–400, 413, 457; R. 2, 6)

4. The text messages from Cynthia Thomas to Lee Crain

On Thursday, September 29, 2016, Thomas called Crain's cell phone, but Crain did not answer. Later that evening, Thomas sent Crain a text message saying, "Hey it's Cynthia can you call me."[8] On Friday, September 30, at about 12:30 p.m., Thomas sent Crain another text saying "Lee. It's Cynthia. Call me." Crain replied, "Will do in a meeting." Thomas responded, "Ok. It's very important!!" She then texted Crain saying, "Claim. U saw her entering stuff on the computer and you figured the printer failed so you gave her the beer she asked for." (Tr. 237, 581; GC. 10; R. 5)

According to Crain, he was sitting with Venci and was just about to go into his due process meeting when he received the text message from Thomas saying "Lee. It's Cynthia.

[8] Thomas had also sent Crain a text message earlier that afternoon, which was garbled and read, "It's Cynthiaight away." (Tr. 600–01; GC. 10; R. 5)

Call me." And, he was actually sitting in the due process meeting when he received the last text message from Thomas referencing him seeing Jones entering stuff on the computer and the printer failing. Crain testified that he interpreted the text messages as Thomas telling him to say something that was not true, because what she suggested in the text messages did not happen. Specifically, Crain did not see Jones entering anything into the POS system, and there were no issues with the printer failing. (Tr. 260–66, 272–76)

According to Crain, he was irritated, mad, and confused after receiving the text messages from Thomas. Crain knew Thomas was a union steward, and he thought she was telling him to lie about what occurred. At the time Crain did not know whether Thomas was representing anybody as a steward in relation to this incident. He believed that, if he had made the statements suggested by Thomas, he could have been fired for lying. Crain never contacted Thomas about her text messages. Instead, he contacted Cathy Faro, the main Bartenders Union steward, and sent her a copy of the texts. Faro was out of town and told Crain that West would take care of the matter at work that evening. (Tr. 241–42, 265–67, 277–79; GC. 11)

Thomas, who was at home when she texted Crain on September 30, testified that she texted Crain in her capacity as a union steward. According to Thomas, her duties as a steward include communicating with employees and helping them recall whatever situation occurred or providing them with possible scenarios if the employee is unable to remember. It is undisputed that neither Crain nor Jones ever sought assistance from Thomas as a steward regarding this incident and nobody asked Thomas to be present during any of the interviews. Notwithstanding, Thomas testified that stewards can reach out and become involved in matters involving employee discipline even if they are not directly asked by management, or the employee, to get involved. (Tr. 272, 591–93, 624, 636, 652)

5. Lee Crain returns to work and reports Cynthia Thomas to management

After his due process meeting on September 30, Crain went home, and then returned to work that night for his 6:00 p.m. shift. When he returned to work, Crain met with West and explained to him the situation regarding Thomas's text messages. Crain told West that he was infuriated. West said that they needed to bring the matter to the attention of management, and the two of them met with Groesbeck. Crain told Groesbeck about the text messages, saying Thomas had asked him to do something that was not true; he showed both Groesbeck and West the actual texts. West then told Groesbeck that what Thomas did was unacceptable, and that she was telling Crain to lie. Groesbeck told the pair to write a statement, and that he would handle the matter. Both West and Crain eventually prepared written statements and submitted them to the Respondent. (Tr. 229, 243–44, 249–50, 267–69, 473–76, 497; GC. 11; R. 7)

D. Cynthia Thomas's suspension and discharge

1. Respondent's investigation into the text messages

After meeting with Crain, Groesbeck sent an email to Zornes and Dorsey. In the email, Groesbeck attached the text messages from Thomas saying that Crain brought the matter to his attention, was extremely upset, and that Thomas, who Groesbeck identified as a shop steward,

was asking Crain to lie about the situation in order to protect Jones. On October 1, 2016, Dorsey forwarded the email, along with the text message thread, to Keefe-Wiseman saying, in part, "FYI, we need to address this with Cynthia [Thomas]." When Keefe-Wiseman received the email from Dorsey her first thought was that she needed to open an investigation. She had just completed her inquiry into the Lobby Bar incident, and nobody claimed that the printer failed as Thomas had stated in her text. (Tr. 351–52, 423; R. 4)

On October 3, Thomas arrived at work, was called into a meeting, and handed a notice saying that she was suspended pending investigation. Thomas was not given a reason for the suspension, but only told that human resources would be contacting her. (Tr. 357, 583–84; GC. 12)

Keefe-Wiseman began her investigation into the matter on October 5, when she received a written statement from West. In the statement, West wrote that Thomas's text message was a request for Crain to lie during the investigation, calling her behavior "reprehensible." Keefe-Wiseman then interviewed Crain on October 6. Crain was upset about the matter, because Thomas was a steward and he believed she was telling him to say something that did not occur. Keefe-Wiseman asked Crain for a screenshot of the text message thread showing the phone number of the sender. Crain provided it and Keefe-Wiseman confirmed that Thomas sent the messages. (Tr. 357, 364–65; GC. 14; R. 7, 8)

Keefe-Wiseman next spoke with Thomas on October 7. Also present for this meeting was Zornes and Tanara Pastore, who served as Thomas's union steward. During the meeting Keefe-Wiseman said that Respondent received a report that Thomas sent a text message to a coworker telling him to lie during an investigation, and Zornes asked if Thomas was aware of the situation. Thomas said that she had sent Crain a text message, but in no way intended to tell him to lie or be dishonest. Instead, Thomas said that her intent was for Crain to check or review his process. According to Thomas, during the meeting she said that her intent was to reach out to Crain, as a union steward, and to relay to him information that was provided to her by Brown regarding the incident.[9] (Tr. 305–06, 346, 369–74, 529–30, 584–89, 634–35; GC. 3; R. 12)

Thomas told Zornes and Keefe-Wiseman that her knowledge of the Lobby Bar incident was based solely upon what Brown had told her. Thomas said that Brown relayed to her information about the incident involving Crain and Jones, and she tried to play devil's advocate coming up with ways in which a drink could be served without having been entered into the system. During the meeting, Thomas also claimed that Brown mentioned something about a computer error. When Keefe-Wiseman asked Thomas what she meant by computer error, Thomas said that printers sometimes go down, and maybe this is what occurred. Keefe-Wiseman asked whether Thomas was sure a ticket did not print, and Thomas replied that she did not know; she only knew the scenario described to her by Brown. This was the first time that either Keefe-Wiseman or Zornes learned that Brown had discussed the incident with Thomas. (Tr. 373–75, 530–32; GC. 3; R. 12)

[9] Keefe-Wiseman denied that Thomas said anything about advising Crain in her capacity as a union steward (Tr. 376, 671) However, she admitted that Brown told her the reason he spoke with Thomas about the Lobby Bar incident was because Thomas was a steward. (Tr. 308–09)

During the meeting, Thomas could not recall the exact language of the text she sent Crain and said that she had deleted the messages. Pastore asked Keefe-Wiseman for a copy of the text message thread, but Keefe-Wiseman would not give her one. Instead, she told Pastore that the company was still investigating. (Tr. 305–06, 376, 587–88; GC. 3; R. 12)

As part of her investigation, Keefe-Wiseman also interviewed Brown on October 11. During the meeting they discussed Brown's conversation with Thomas about the Lobby Bar incident. That same day Brown emailed her a summary of what occurred during his discussion with Thomas on September 28. (Tr. 388–89; GC. 6, 14)

The last person Keefe-Wiseman interviewed was Jones; they spoke over the phone. Keefe-Wiseman asked Jones whether she had been in contact with Thomas, in her capacity as a union steward, regarding the Lobby Bar incident. Jones replied saying that she and Thomas did not get along and therefore she would not call Thomas for help. In fact, Jones said that she did not think that Thomas even knew about the incident. (Tr. 380–82; R. 9; GC. 14)

When she concluded her investigation, on October 13, 2016 Keefe-Wiseman prepared a case summary, with an overview of her findings and her recommendation. She recommended that Thomas be fired, saying that "Thomas sent a text message to another employee directing them to lie in a Company investigation." Keefe-Wiseman testified that the CBA allows an employee to be discharged for misconduct, including dishonesty, without prior progressive discipline. And she believed that Thomas's actions amounted to misconduct, specifically dishonesty. Keefe-Wiseman believed that, in the text message, Thomas was instructing Crain to lie during an investigation. She presented her findings to Zornes and Dorsey. (Tr. 299, 321, 386–87, 390–93; R. 10)

2. Decision to discharge Thomas

According to Dorsey, after she received the case summary from Keefe-Wiseman, they had a conversation about the matter. She looked at the text messages, the case notes, the written statements, and Keefe-Wiseman's notes of her due process meeting with Thomas. She also took into consideration the fact that Thomas had a 3-day suspension on her record stemming from an incident in January 2016 involving her working "off the clock" and having her daughter in the service area of the bar. The 3-day suspension stated that Thomas had engaged in various misconduct including dishonesty. Dorsey then reviewed the information with Shkorupa, the vice president of food and beverage. Collectively they decided that Keefe-Wiseman's recommendation to discharge Thomas was appropriate, and that Thomas should be fired. (Tr. 301–02, 422, 425–27, 452; R. 1)

According to Dorsey, Thomas was discharged for dishonesty and for not being forthcoming in an investigation. Dorsey testified that she thought Thomas was being dishonest when she texted Crain telling him to claim that he saw something he actually did not see. Dorsey also thought that Thomas was dishonest in her due process meeting with Keefe-Wiseman. The notes of the meeting indicate Thomas said that Brown told her Crain gave Jones a beer because Jones was on the computer and Crain thought Jones "rang it in." Dorsey thought that Thomas was being dishonest because "at that point she knew that wasn't . . . true." Dorsey

further explained that, by the time of the due process meeting, Thomas knew that Jones had refused to ring the beer into the POS system because Brown had told her that he entered the beer into the system because Jones refused to do so.[10] Thus, Dorsey thought Thomas was being dishonest, because she knew Jones did not ring the beer into the system. (Tr. 433, 454, 438–39

After the decision to discharge Thomas was made, it fell upon Zornes, as head of the department, to relay the information to Thomas. Zornes contacted Thomas and asked her to come into the office for a meeting on October 18. Present was Zornes, Thomas, and a union steward. Zornes read the separation notice to Thomas and had her sign it. The separation notice reads, in part, as follows:

> Cynthia Thomas is being separated from the company in accordance with article 8, section 8.01 (a) of the CBA for progressive discipline. Termination reason for violation of GRC# 28 Dishonesty. Employees will be forthcoming and honest in all written and verbal communication connected to company investigations, company records and communications. Employees will not knowingly make false statements or omit pertinent information particularly regarding company reports and investigations. #21 Failure to cooperate during or interference with a company investigation. Refusal to cooperate with, provide information to or identify yourself to management security or a guest. #39 failure to comply with the MGM Resorts International Code of Business Conduct, Ethics and Conflict of Interest Policy. Specifically, Thomas sent a text message to another employee directing them to lie in a Company investigation.

The language in the separation notice was lifted directly from the recommendation in Keefe-Wiseman's case summary and lists the various sections of Respondent's Standards of Conduct which Thomas was deemed to have violated.[11] Zornes testified that, in the five years she had worked at the MGM Grand, she was not aware of any other union steward ever having been discharged. (Tr. 508, 533–36; GC. 7, 13)

III. PROCEDURAL BACKGROUND

On October 11, 2016, Thomas filed the charge in this matter, which was subsequently amended on November 4, 2016, alleging that her suspension and discharge violated Sections 8(a)(1) and (3) of the Act. On October 20, 2016, the Union filed a grievance over Thomas's discharge, claiming her termination violated the terms of the parties' CBA. On December 30, 2016, the Regional Director deferred the processing of the unfair labor practice charge to the grievance and arbitration process. An arbitration hearing was held over the Union's grievance in November 2017. The Counsel for the General Counsel ("General Counsel") and Respondent stipulated that Respondent sought to submit the charge allegations in this matter to the arbitrator, but the Union refused to permit the arbitrator to decide those issues. The arbitrator issues his opinion on April 2, 2018, denying the grievance. On August 31, 2018, the Regional Director

[10] Dorsey testified that Brown's September 28 email, which was forwarded to her the next day, was not one of the documents she reviewed in making her decision to fire Thomas. (Tr. 435–37; GC. 5, 17)

[11] According to Keefe-Wiseman, she listed the rules as written, and did not edit them to only include the language relevant to Thomas's conduct. (Tr. 320–21)

revoked his earlier decision to defer processing of the unfair labor practice charge and continued his investigation into the charge allegations. On September 27, 2018, the Regional Director issued the Complaint which is the subject matter of this proceeding. (Tr. 668; GC. 1(a), 1(c), 1(e), 1(f), 1(h); JX. 2, 3, 4, 6)

Respondent filed a motion for summary judgment with the Board on January 15, 2019, seeking dismissal of the complaint arguing that: (1) deferral to the arbitration decision is mandatory pursuant to *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014), review denied sub. nom. *Beneli v. NLRB*, 873 F.3d 1094 (9th Cir. 2017); and (2) if deferral pursuant to *Babcock & Wilcox* is not proper, that the Board should reconsider *Babcock & Wilcox*, and instead apply the deferral standards as set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984). On February 14, 2019, the Board denied the motion without prejudice to Respondent's right to renew its argument at trial and also to the Board on any potential exceptions. (GC. 15) After the hearing in this matter had closed, in its post-trial brief Respondent renewed its deferral argument.

IV. POSITION OF THE PARTIES

The General Counsel argues that Thomas texted Crain in her capacity as a Culinary Union steward, and therefore her conduct is protected under the Act. Furthermore, the General Counsel asserts that Thomas reasonably believed that what she texted Crain actually occurred, and therefore there was no misconduct; Thomas was simply trying to refresh Crain's recollection of the Lobby Bar incident as she understood the facts to be.

The General Counsel's brief analyzes the legality of Thomas's suspension and discharge under three different analytical frameworks: (1) *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), which is used when there is no dispute as to the reason for the discipline and the employer has a good-faith but mistaken belief that the employee engaged in misconduct during the course of protected activity; (2) *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), which is used in mixed-motive cases; and (3) the framework used by the Board where an employee is disciplined for misconduct that is part of the *res gestae* of protected concerted activities. The General Counsel does not advocate for the application of any one specific framework, but instead asserts that under all three Respondent's conduct constitutes a violation. Finally, the General Counsel argues that deferral to the arbitration award is improper under the circumstances presented.

Respondent asserts that Thomas's actions were not protected by the Act. And, pointing to the fact that neither Crain nor Jones asked her to serve as their union steward, Respondent argues that Thomas was not acting as a steward when she texted Crain. Finally, even if her actions could initially be considered protected, Respondent asserts that they lost the protection of the Act as Thomas instructed a coworker to lie to management during an investigation.

Respondent also analyzes the facts under the same three standards proffered by the General Counsel but argues there is no violation under any standard. Finally, Respondent asserts that deferral to the arbitration award is mandatory under *Babcock & Wilcox*, and if the Board finds otherwise, it should change the existing deferral standard.

V. ANALYSIS

A. Respondent has not shown that deferral is appropriate

The Board's standard for deferral to arbitral decisions alleging violations of Section 8(a)(3) and (1) of the Act is set forth in *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014). Pursuant to *Babcock & Wilcox* "the Board will defer to an arbitral decision if the party urging deferral shows that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award." Id. at 1131.

Here, before considering whether Board law reasonably permitted the arbitration award, Respondent needs to show that the other two *Babcock & Wilcox* standards are met. Respondent has met the second standard but not the first.

At trial, Respondent and the General Counsel stipulated that the MGM Grand sought to submit the unfair labor practice allegations to the arbitrator, but the Union refused to permit the arbitrator to decide the issue. (Tr. 668) Under the circumstances, I am bound by this stipulation. *Labor Plus, LLC.*, 366 NLRB No. 109, slip op. at 9, fn. 33 (2018) ("Stipulations of facts voluntarily entered into by the parties are binding on both trial and appellate courts.") Therefore, Respondent has satisfied the second prong of the *Babcock & Wilcox* test. However, the evidence does not show that the arbitrator was explicitly authorized to decide the unfair labor practice matters. The CBA does not explicitly give the arbitrator this authority. (JX. 1, JX. 5, p. 1) And there is no evidence that the Union and Respondent expressly agreed to give the arbitrator authority to decide the matter. Instead, the evidence shows the opposite; the Union refused to have the statutory issues presented to the arbitrator.

In its brief, as evidence that the parties agreed to have the arbitrator decide the issue, Respondent points to the Regional Director's initial pre-arbitration deferral letter which states "[b]ecause the parties have explicitly authorized the arbitrator to decide the statutory issues in this case, the Board's deferral standards" set in *Babcock & Wilcox* apply. (Resp't Br., at 29; GC 1(e)) However, the Regional Director later revoked his deferral decision. (GC. 1(f)) Whatever the Regional Director's changing views were on this issue, his thinking does not constitute direct evidence that the parties explicitly authorized the arbitrator to decide the matter. The Regional Director's beliefs are not binding on the Board. Cf. *Peabody Coal Co.*, 180 NLRB 263, 269 fn. 19 (1969) (Regional Director's refusal to issue complaint, which was upheld on appeal, does not foreclose the General Counsel from reconsidering the matter and is not binding upon the administrative law judge or the Board). "[R]ather than seeking to psychoanalyze the regional director," Respondent needed to introduce direct evidence to support its argument. *McLeod v. Teamsters Local 239*, 330 F.2d 108, 112 (2d Cir. 1964). Respondent did not do so. In fact, an email exchange between the parties in the weeks before the arbitration, along with the arbitrator's statement of the matters before him, show that the arbitrator was not given explicit authority to decide the unfair labor practice issues. (JX. 4; JX. 5) Because Respondent has not shown that the arbitrator was explicitly authorized to decide the unfair labor practice issues,

deferral to the arbitration award is not appropriate. *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014).[12]

B. The General Counsel has not shown a violation under Burnup & Sims

The General Counsel asserts that Thomas's conduct was protected because she was acting in her capacity as a union steward when she texted Crain, and she was unlawfully fired for supposed misconduct resulting from her protected activity. The facts at trial show there is no dispute that Thomas's text message to Crain was the reason for her suspension and discharge. Accordingly, I believe that the *Burnup & Sims*, 379 U.S. 21 (1964) framework applies. See *L-Z-Boy Midwest*, 340 NLRB 80 (2003), enfd. in pertinent part 390 F.3d 1054, 158–60 (8th Cir. 2004) (noting the judge erred for applying *Wright Line* because there was no dispute as to the reason for the discipline and the proper standard was *Burnup & Sims*).

Under *Burnup & Sims*, a violation occurs "if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred." 379 U.S. at 23. Under this analysis, the respondent has the burden of showing that it held a good faith belief that the employee engaged in misconduct. *Roadway Express, Inc.*, 355 NLRB 197, 204 (2010). "If the employer meets its burden, the burden shifts to the General Counsel to show that the employee did not, in fact, engage in the asserted misconduct." Id.

The issue of a union steward being fired for alleged dishonesty arising out of his actions as a steward was specifically addressed by the Board in *Roadway Express*. In *Roadway Express*, the employer fired a union steward for alleged misconduct in connection with an on-the-job injury form submitted by an employee. The employee told the steward that he was injured at work, and the steward assisted the employee with obtaining and submitting the requisite paperwork to the employer. *Roadway Express, Inc.*, 355 NLRB at 198. The employer investigated the circumstances of the injury and obtained hospital records showing the employee was not injured at work. Id. Both the employee and the union steward were fired. The employee was fired for dishonesty and fraud in reporting a personal illness as a work injury, and the union steward for "being involved in and promoting" the employee's dishonesty. Id.

Applying *Burnup & Sims*, the Board affirmed the trial judge's finding that the discharge of the union steward was unlawful. The Board noted that the employer met its burden of showing that it honestly believed the union steward engaged in misconduct. *Roadway Express*, 355 NLRB at 204. However, the evidence presented by the government showed that the union steward did not, in fact, engage in the alleged misconduct. Id. Instead, the evidence established that the employee told the union steward that he was injured at work. Thus, the union steward assisted the employee in filing an injury report which the steward actually believed to be truthful; he therefore "did not, in fact, engage in misconduct." Id. at 204, 215.

[12] As for Respondent's argument that *Babcock & Wilcox* should not apply, "it is a judge's duty to apply established board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether that precedent should be varied." *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) (internal citations omitted). Accordingly, I am bound by *Babcock & Wilcox*.

Using this analysis here, assuming that Thomas was engaged in protected activity when she texted Crain, Respondent has shown that it held a good faith belief that Thomas engaged in misconduct. Thomas's text message tells Crain to claim that he saw Jones "entering stuff on the computer," and that Crain "figured the printer failed" so he gave Jones "the beer she asked for." Both Crain and West complained to Respondent that Thomas was telling Crain to lie in connection with Respondent's investigation. And, the evidence available to Respondent showed that Jones did not actually enter anything into the computer, the printer did not fail, and nobody claimed that there were any issues with the computer or the printer. Under these circumstances, where the evidence shows that Thomas was urging Crain to say something during the investigation that was untrue, I find Respondent has shown that it held an honest belief that Thomas engaged in misconduct.

The burden therefore shifts to the General Counsel to show that Thomas did not, in fact, engage in the asserted misconduct. The General Counsel did not do so. Had Thomas merely suggested possible scenarios to Crain that could explain what occurred to refresh his recollection, as the General Counsel argues, then the government's position would be much stronger. However, Thomas's text message does not make any suggestions. After telling Crain it was "very important," Thomas explicitly tells Crain to "claim" he saw Jones "entering stuff on the computer" and that he "figured the printer failed." Taking into consideration the words used in their context, along with the setting and purpose for which they were used, it is clear to me that Thomas was not suggesting potential explanations or trying to refresh Crain's recollection. *United States v. Milton*, 8 F.3d 39, 45 (D.C. Cir. 1993) (after considering the context and setting it was up to the trier of fact to determine the meaning of the word "claim"). Instead, Thomas was telling Crain to convey to Respondent things that never happened.

Unlike *Roadway Express*, where the government showed that the union steward believed the information in question to be truthful, evidence is lacking that Thomas believed her text message was true. There was no evidence that Thomas actually believed that Crain saw Jones entering information into the computer, or that Crain believed the printer failed. While Brown did tell Thomas that Jones acted as though she was entering information into the POS system, he never said that Crain saw Jones do so, or that Crain thought Jones had done so. If this inaccuracy was the only issue at hand, perhaps Thomas could be excused for misinterpreting what Brown had told her. However, Thomas also texted Crain to say that he "figured the printer failed" so he gave Jones the beer in question. There is no evidence whatsoever that Brown, Crain, Jones, or anybody whatsoever, told Thomas that Crain thought the printer had failed. Nor is there evidence that there were any problems with the printers that night. Therefore, Thomas is unlike the union steward in *Roadway Express* who proffered information to the employer that he believed to be truthful.

Accordingly, the General Counsel has failed to show that Thomas did not, in fact, engage in the misconduct for which she was fired. Therefore, under *Burnup & Sims*, I recommend that the General Counsel's complaint allegations that Respondent violated Sections 8(a)(1) and (3) of the Act be dismissed.

C. The General Counsel has not shown a violation under Wright Line

In mixed motive cases, where an employer's motives may be a mix of legitimate and discriminatory reasons, the Board applies the burden shifting analysis set forth in *Wright Line*. *Medeco Security Locks, Inc., v. NLRB*, 142 F.3d 733, 741 (4th Cir. 1998) (citing *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983)). Under *Wright Line*, the General Counsel must prove by a preponderance of the evidence that the employee's protected activity was a motivating factor for the employer's actions. *Shearer's Foods, Inc.*, 340 NLRB 1093, 1094 (2003). The elements required to support such a showing are union or protected concerted activity, the employer's knowledge of that activity, and animus against the employee's protected conduct. Id.

If the General Counsel makes this initial showing, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. Id; see also *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1550 (10th Cir. 1996) (by shifting the burden the employer's justification becomes an affirmative defense). Where an employer's explanation is "pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon." *Limestone Apparel Corp.,* 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). Also, where the "proffered non-discriminatory motivational explanation is false even in the absence of direct motivation the trier of fact may infer unlawful motivation." *Roadway Express*, 327 NLRB 25, 26 (1998).

Here, assuming that Thomas's actions were protected union activity, the General Counsel has failed to show that Respondent's actions were motivated by animus against the Union or her protected conduct. There are no independent 8(a)(1) allegations in the Complaint, or other unfair labor practice violations, that would support a finding of unlawful animus. See *Dynasteel Corp.*, 346 NLRB 86, 88 (2005) (employer's numerous 8(a)(1) violations provide evidence of its anti-union animus). Instead, the General Counsel's brief asserts that animus against Thomas's union activities is shown by her being questioned by Respondent about her text message exchange with Ford. (GC. Br., at 13–15) However, other than making this bare assertion and arguing the government's view of the facts, the General Counsel does not explain how this incident equates to anti-union animus. Nor does the General Counsel cite any case-law that would support such a claim.

The credited evidence shows that Ford met with Dorsey and showed her a text message from Thomas which said that Dorsey should not be trusted.[13] In the subsequent meeting with Thomas, Respondent asked whether she sent a text message to Ford which mentioned Dorsey "in not such a good manner," and her intent in sending the message. Respondent then reviewed the company's policies with Ford. Nothing in these questions evidences animus against Thomas's union activities, or her activities as a union steward. And the General Counsel does not allege

[13] Ford was not called as a witness, nor was the text message in question introduced into evidence. Because Thomas testified that she could not remember the specifics of the text, the only credited evidence of what occurred in this meeting, or what the text message said, comes from Dorsey. There is no reason to discredit Dorsey's unrebutted testimony about what occurred during her meeting with Ford.

that any of the policies Respondent reviewed with Thomas in this meeting were unlawful, or otherwise show animus.

While Thomas testified that her text about Dorsey was prompted by an earlier text exchange where she asked Ford whether a dance audition was going to be required to work at Losers, the General Counsel presented no evidence that Dorsey, Zornes, or Keefe-Wiseman knew about this earlier text message exchange. Also, the evidence shows that Dorsey's instructions to Keefe-Wiseman to address the matter with Thomas was prompted not by Thomas's protected activities, but by Ford raising the issue with Dorsey about receiving an odd text message from Thomas. Again, the General Counsel cites no precedent in support of her claim that this exchange is evidence of animus, and my research finds none.

The General Counsel also seems to assert that animus should be inferred from Thomas's alleged disparate treatment in comparison to Jones and Crain. The General Counsel complains that Jones was never disciplined, even though she was the person who was responsible for ordering the beer and was insubordinate when she refused to follow Brown's instructions to enter it into the POS system. And Crain was only given a documented verbal warning because he was observed violating policies unrelated to the incident. The General Counsel argues that their conduct was similar to Thomas's in that all three had a mistaken belief about what occurred. Therefore, according to the government, the fact Thomas was fired over her mistaken believe about what transpired, while the other two were not disciplined over the incident, amounts to disparate treatment. (GC. Br., at 53–55)

However, I find that Jones and Crain are not similarly situated in that their actions were not comparable to Thomas's. *SBM Site Servs., LLC*, 367 NLRB No. 147, slip op. at 3 (2019) (employees who engaged in less severe misconduct are not similarly situated comparators when considering disparate treatment). The facts as presented at trial show that, at the time of the incident both Jones and Crain believed that the beer in question had been entered into the POS system, and that Jones was confused and concerned about overcharging customers while she was trying to close out two large bills. Neither Jones nor Crain did anything that was similar to, or more severe than, Thomas who urged a coworker to say something during a company investigation that was untrue. And, the evidence does not show that Thomas's text message with Crain was based upon her good faith but mistaken belief as to what happened. As discussed earlier, Thomas had no basis for a mistaken belief that Crain thought the printer had failed or that he saw Jones ring the beer into the POS system. There is no evidence of animus here.

Finally, the General Counsel appears to rely on an alleged statement from Dorsey that union stewards are held to a higher standard to show animus. (GC. Br., at 52) However, a closer look at the testimony shows that the General Counsel has failed to meet her burden.

Culinary Union steward Tanara Pastore testified that, during a meeting held on an unknown date and at a location she could not remember, Dorsey said that shop stewards are held to a higher standard. Pastore could not remember what the meeting was about or the context in which Dorsey the statement was made. (Tr. 76–77, 93–95, 98–100)

In these circumstances, even if Pastore's testimony is true it is insufficient to establish unlawful motive. Under certain conditions union officials, including stewards, can in fact be held to a higher standard. *IBEW Local 1392, AFL-CIO, v. NLRB*, 786 F.2d 733, 735–36 (6th Cir. 1986) (employer can hold union stewards to higher standard, and impose harsher discipline on them, if the union has made a clear and unmistakable waiver of the stewards' statutory right to be free from such disparate treatment), enforcing *Indiana & Michigan Elec. Co.*, 273 NLRB 1540 1541 (1985). Accordingly, because the General Counsel has not presented evidence that Respondent harbored animus against the Union, or against Thomas for her union or other protected activities, under *Wright Line* no prima facie case of discrimination has been presented.

D. The totality of the circumstances does not support a violation

When an employee is discharged for misconduct that is part of the *res gestae* of their protected concerted activity, the proper inquiry is whether the employee lost the protection of the Act in the course of that activity. *Desert Cab, Inc.*, 367 NLRB No. 87, slip op. at 1 fn.1 (2019). Generally, when the alleged misconduct involves communications or conduct between coworkers, the Board considers the totality of the circumstances surrounding the conduct at issue to determine whether the employee lost the protection of the Act.[14] *NC-DSH, LLP*, 363 NLRB No. 185, slip op. at 1 fn. 3 (2016).

Again, assuming that Thomas was engaged in protected activity when she texted Crain, the totality of the circumstances does not support finding a violation. Respondent had suspended Crain and was investigating whether he engaged in misconduct. Thomas knew Respondent was investigating Crain's conduct regarding the Lobby Bar incident and had been trying to contact him about the matter. After both calling and texting Crain to no avail, Thomas texted Crain again telling him to call her. Crain replied saying he would but was in a meeting. Thomas then texted him that it was very important, and for him to claim that he saw Jones "entering stuff on the computer" and that Crain "figured the printer failed" so he gave Jones the beer had she asked for. According to Crain this was untrue; he did not see Jones entering anything into the computer and did not think there were any problems with the printer.

It is clear under the circumstances presented, that Jones was instructing Crain to tell Respondent, as part of its investigation into the Lobby Bar incident, to say things that were untrue. Thomas's text message was not impulsive but was a calculated attempt to tell Crain what to say during the investigation. There is no evidence that Respondent was an anti-union employer, that the company held anti-union hostility, or that employees were prohibited from using text messages, or other means, to pursue their Section 7 rights. See *Honda of America Mfg., Inc.*, 334 NLRB 746, 747–48 (2001) (Board considers various factors, including whether there is evidence the employer held anti-union hostility and whether employees could use various means to pursue their Section 7 rights without company objection, to decide whether otherwise protected conduct became unprotected). Furthermore, there is no evidence that Thomas's text message exchange was provoked by Respondent, or by any unfair labor practices.

[14] I find that *Atlantic Steel*, 245 NLRB 814 (1979) is not applicable to these circumstances. The *Atlantic Steel* framework is not well suited to address employees' communications with coworkers, but instead is more properly used when the alleged misconduct is between an employee and a manager or supervisor. *Triple Play Sports Bar & Grill*, 361 NLRB 308, 310 (2014); *Entergy Nuclear Operations, Inc.*, 367 NLRB No. 135, slip op. at 1, fn. 1 (2019).

Finally, there is no evidence that Thomas held a good faith belief that Crain saw Jones entering anything into the computer, or that Crain thought that the printer had failed. *UAW v. NLRB*, 514 F.3d 574, 584 (2008) ("Absent good faith, deliberate falsifications may lose the protection of the Act if the circumstances suggest that the falsification was sufficiently egregious."). It is undisputed that the CBA allows Respondent to immediately discharge someone for dishonesty. And, Thomas already had a 3-day suspension on her record for, among other things, dishonesty when she messaged Crain; the next step in Respondent's progressive disciplinary policy is termination. Accordingly, under the circumstances of this case, I find that the General Counsel has not met her burden of proving that Thomas's suspension and discharge constituted a violation.

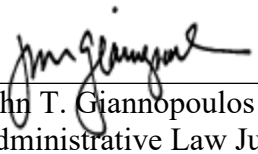
CONCLUSIONS OF LAW

The General Counsel failed to prove that Respondent violated Section 8(a)(1) and (3) of the Act as alleged in the Complaint. On these findings of fact, conclusions of law, and based upon the entire record, I issue the following recommended[15]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. October 29, 2019



John T. Giannopoulos
Administrative Law Judge

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.